

IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE, DIVISION I
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

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DAVID C. TOWNSEND CLERK
DC

STATE OF TENNESSEE

vs.

PERRY AVRAM MARCH

No. 2004-D-3113

**DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO DISMISS COUNTS TWO AND THREE
OF INDICTMENT AS TIME BARRED**

In support of his motion to dismiss Counts 2 and 3 of the indictment as time barred, the Defendant would respectfully cite to the Court the following authorities and argument, in addition to those set forth in the motion itself.

Tenn.R.Crim.P. 12(b) provides a defendant a procedural vehicle through which to litigate a claim that the prosecution is time-barred. *State v. Messamore*, 937 S.W.2d 916, 919 (Tenn. 1996). Where there is a statute of limitations that bars prosecution of the offense charged, there should be a sufficiently definite averment of time in the indictment to show that the offense was committed within the statutory limit. *State v. Davidson*, 816 S.W.2d 316, 318 (Tenn. 1991). Where an indictment or presentment shows upon its face that the applicable statute of limitations has expired, the instrument must allege facts which

demonstrate that the statute was tolled for a sufficient period of time to avoid the bar of the statute of limitations. *Davidson*, at 321; *see also*, *Messamore*, at 919.

As detailed in the body of the instant motion, Count 2 of the indictment alleges commission of a Class E felony "on a day in **August, 1996**". The indictment was filed more than eight (8) years after the alleged commission of the offense; Tenn. Code Ann. § 40-2-101(b)(4) fixes the limitation period for Class E felonies at two (2) years.

Similarly, Count 3 of the indictment alleges commission of a Class C felony "on the ____ day of **September, 1996**". The indictment was filed more than eight (8) years after the alleged commission of the offense; Tenn. Code Ann. § 40-2-101(b)(3) fixes the limitation period for Class C felonies at four (4) years.

The only tolling facts alleged in these counts of indictment are that the Defendant "was not usually and publicly a resident within this state since October, 1996." Tenn. Code Ann. § 40-2-103 states:

40-2-103. Period of concealment of crime or absence from state. – No period, during which the party charged conceals the fact of the crime, or during which the party charged was not usually and publicly resident within the state, is included in the period of limitation. [Code 1858, § 4988; Shan., § 6947; mod. Code 1932, § 11488; T.C.A. (orig. ed.), § 40-205.]

Since no acts of concealment are here alleged, the instant motion deals with the exclusion of the "period . . . during which the party charged was not usually and publicly resident within the state" from the period of limitation. The Defendant would urge that this

statutory language, unless given a saving construction, unconstitutionally penalizes or impinges upon the exercise of the fundamental constitutional right of interstate travel in violation of constitutional equal protection guaranties.

The right to travel to and reside in any part of this country is guaranteed by the United States Constitution. *State v. Sliger*, 846 S.W.2d 262, 264 (1993); *Dunn v. Blumstein*, 405 U.S. 330, 338, 92 S.Ct. 995, 1001, 31 L.Ed.2d 274 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 629-631, 89 S.Ct. 1322, 1328-1329, 22 L.Ed.2d 600 (1969). This right to interstate travel has been recognized as a fundamental right for equal protection purposes. *See, e.g., State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994); *Newton v. Cox*, 878 S.W.2d 105, 109 (Tenn. 1994); *Harrison v. Schrader*, 569 S.W.2d 822, 825 (Tenn. 1978); *United States v. Guest*, 383 U.S. 745, 757, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966) ("The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union."). "Equal protection analysis requires strict scrutiny of a legislative classification . . . when the classification interferes with the exercise of a 'fundamental right'", *State v. Tester*, at 828, such as the right to interstate travel. *Ibid.*

Had the Defendant declined to exercise his constitutional right to relocate from one state to another and remained usually and publicly resident within the State of Tennessee, he would not have been subject to being charged after August 31, 1997 with the instant allegation of a Class E felony, nor would he have been subject to being charged after

September 30, 2000 with the instant allegation of a Class C felony. That these charges are before this Court at all is therefore a direct consequence of the Defendant's exercise of his constitutional right.

The Defendant, a former citizen of this State who has relocated outside Tennessee, is subjected to discriminatory treatment vis-à-vis a citizen of Tennessee who has continuously resided within the State, such that the Defendant's fundamental right to interstate travel is plainly impinged by the challenged portion of Tenn. Code Ann. § 40-2-103. The General Assembly has plainly created two classes of accused persons—those who exercise their right of interstate travel and those who decline—and has treated these classes differently based solely upon the exercise of a fundamental right.

The challenged statute, however, is subject to a construction which will avoid a suggestion of constitutional invalidity. Prudence and law dictate adoption of a statutory construction which would moot or avoid any constitutional issue. "Under Tennessee law, courts do not decide constitutional questions unless resolution is absolutely necessary for determination of the case and the rights of the parties." *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995); *Patterson v. Department of Labor & Workforce Development*, 60 S.W.3d 60, 63 n.2 (Tenn. 2001). Moreover, "[w]hen faced with a choice between two constructions, one which will sustain the validity of the statute and avoid a conflict with the Constitution, and another which renders the statute unconstitutional, [Tennessee courts] must choose the

former.” *State v. Sliger, supra*, 846 S.W.2d at 264.

That kind of saving construction is here suggested by the Tennessee Supreme Court’s construction of the statute which, under some circumstances, provides for tolling of a statute of limitations as to an out-of-state defendant in civil litigation. Tenn. Code Ann. § 28-1-111 provides:

28-1-111. Suspension during absence from state – If at any time any cause of action shall accrue against any person who shall be out of this state, the action may be commenced within the time limited therefor, after such person shall have come into the state; and, after any cause of action shall have accrued, if the person against whom it has accrued shall be absent from or reside out of the state, the time of absence or residence out of the state shall not be taken as any part of the time limited for the commencement of the action. [Acts 1865, ch. 10, § 3; Shan., § 4455; Code 1932, § 8581; T.C.A. (orig. ed.), § 28-112.]

This statute has been authoritatively interpreted to be inapplicable where the remedy of the civil plaintiff is complete and unaffected by the absence of the defendant from the state. *See, Arrowood v. McMinn County*, 173 Tenn. 562, 565, 121 S.W.2d 566, 567 (1938) (“[W]hen the remedy of the suitor is complete and unaffected by the absence of the defendant, when his non-residence does not affect the right to sue, Code, Section 8581 (Act of 1865) providing that ‘the time of his absence or residence out of the state shall not be taken as any part of the time limited for the commencement of the action’ is without application.”). *Accord: Lam v. Smith*, 891 S.W.2d 2017, 210 (Tenn. 1994).

Prudential considerations favor adoption of a similar construction of § 40-2-103. “To

further the purpose of protecting individuals from having to defend against stale charges, statutes of limitation should be liberally construed in favor of a criminally accused. . . . Exceptions that extend the limitation period . . . are to be strictly construed against the state.” *State v. Henry*, 834 S.W.2d 273, 276 (Tenn. 1992). The Supreme Court of Tennessee has recognized that, in criminal proceedings, a statute of limitations serves two primary purposes—to avoid the use of stale evidence and to provide an incentive for swift governmental action in criminal cases. *State v. Pearson*, 858 S.W.2d 879, 886 (Tenn. 1993). Our Supreme Court has further opined:

The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.

State v. Henry, supra, 834 S.W.2d at 276, quoting *Toussie v. United States*, 397 U.S. 112, 114-15, 90 S.Ct. 858, 860, 25 L. Ed.2d 156 (1970).

Unless a limiting construction is adopted, the language of § 40-2-103 would permit indefinite tolling of a statute of limitations as to an out-of-state defendant. That would be inconsistent with the salutary purposes of the statute. In the context of civil litigation, the Supreme Court in *Lam v. Smith, supra*, explained its reasons for having previously adopted

a limiting construction of § 28-1-111 in *Arrowood v. McMinn County*:

“... On its face, the suspension statute is unlimited; theoretically a plaintiff may rely upon the statute to toll the limitations period for as long as a defendant remains out-of-state. However, this open-endedness potentially raises the same problems that a statute of limitations is designed to prevent: crucial witnesses may die or otherwise become unavailable, witnesses’ memories may fade, and so forth if the action is held in abeyance for too long a period of time. The *Arrowood* rule was formulated to avoid these difficulties by limiting the application of the suspension statute to situations where it is truly necessary; or, to use the language of the *Arrowood* court, to situations where the plaintiff would not have a ‘complete and unaffected remedy’ if not allowed to rely upon the statute. . . .”

891 S.W.2d at 211–12. The same reasoning should logically apply to criminal statutes of limitation, in light of the statutory purposes articulated in *Henry, supra*, and *Pearson, supra*.

The Defendant’s absence from the State of Tennessee has not impaired the State’s ability to prosecute crimes which are alleged to have occurred more than eight years prior to the finding of the indictment. This Court can judicially notice from its own records that this Defendant was tried and convicted pursuant to a timely-filed indictment for theft of property, which theft was alleged to have occurred during the same approximate time frame as the offenses which are alleged in the matter at bar.

The Court can resolve the instant motion in the Defendant’s favor without reaching any issue as to constitutional validity or invalidity of § 40-2-103; however, the Court cannot deny the Defendant’s motion without addressing the equal protection issue presented therein. Because a fundamental constitutional right is impinged or burdened, the standard

of equal protection review is strict scrutiny. *See, e.g., State v. Smoky Mountain Secrets*, 937 S.W.2d 905, 911 (Tenn. 1996).

Under the strict scrutiny standard, the State has the burden of proving (1) that the classification is necessary to serve a compelling state interest and (2) that it is narrowly drawn to achieve that end. *Doe v. Doe*, 127 S.W.3d ____ (Tenn. 2004). Since the right to travel is a constitutionally protected right, "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Dunn v. Blumstein, supra*, 405 U.S. at 339, 92 S.Ct. at 1001, quoting *Shapiro v. Thompson, supra*, 394 U.S. at 638, n.21. The compelling-state-interest test is triggered by "any classification which serves to *penalize* the exercise of [the] right to travel." *Dunn, supra*, at 340, 92 S.Ct. at 1002. "If there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Id.*, at 343, 92 S.Ct. at 1003.

Under strict scrutiny analysis, the government has the burden of proving that the challenged classifications are narrowly tailored measures that further compelling governmental interests. *Johnson v. California*, 543 U.S. 499, 505, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005). The United States Supreme Court has observed that:

Only rarely are statutes sustained in the face of strict scrutiny. As one

commentator observed, strict-scrutiny review is “strict” in theory but usually “fatal” in fact. Gunther, *The Supreme Court, 1971 Term -- Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

Bernal v. Fainter, 467 U.S. 216, 219 n.6, 104 S.Ct. 2312, 81 L.Ed.2d 175 (1984). The State must advance a factual showing that its claimed justifications for the challenged classification address a real, as opposed to a merely speculative, problem to the State; “[w]ithout a factual underpinning, the State’s asserted interest lacks the weight we have required of interests properly denominated as compelling.” *Id.*, at 228.

The limiting construction of Tenn. Code Ann. § 40-2-103 suggested hereinabove by the Defendant, to-wit: that tolling of a criminal statute of limitation applies to an out-of-state criminal defendant only where such defendant’s absence from Tennessee impedes the commencement of the prosecution itself, is a less restrictive means which would suffice satisfy any governmental interest. The burden to show otherwise is here on the State of Tennessee.

Because defense counsel cannot anticipate what compelling interest(s) the State will proffer, the Defendant requests leave to further brief the issues herein once the State has identified such governmental interest(s).

Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify that a correct and complete copy of the foregoing has been transmitted by facsimile and hand-delivered to the Office of the District Attorney General, 222 Second Avenue North, Nashville, Tennessee 37201, this 28th day of June, 2006.


JOHN E. HERBISON